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FEDERAL COMMUNICATIONS COMMISSION
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Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266

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SUMMARY

The 1992 Cable Act directs the Commission to reduce the burdens on small cable systems in the administration of its rate regulations. The steps taken by the Commission thus far are inadequate. Commenters herein suggest that the Commission should

the initial equipment cost basket would resolve this problem. Converter investments may not be fully recoverable, particularly if they are already largely depreciated. Moreover, this could discourage investment in newer converters. A fairer method of pricing would be to use a pro forma cost formula to allow recovery of original cost. Finally, the cost of maintaining service to additional outlets is nowhere considered in the Commission's rate scheme. A specific allocation of costs, and a concomitant rate methodology, is needed.

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In the Matter of:	)	
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Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
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Rate Regulation	)	

To: The Commission

PETITION FOR RECONSIDERATION

Fleischman and Walsh, on behalf of Arizona Cable Television Association; Falcon Cable TV; Mid-America Cable Television Association (representing cable operators in the states of Kansas, Nebraska, Oklahoma and Missouri); Mt. Vernon Cablevision; Nashoba Communications Limited Partnership; Pennsylvania Cable Television Association; Prestige Cable TV; Star Cable Associates; Tele-Media Corporation; WestStar Communications, Inc.; and Whitcom Investment Company (collectively "Commenters"), pursuant to Section 1.106 of the Commission's rules, hereby requests reconsideration of the Commission's Report and Order in the above-referenced proceeding.[1] Commenters participated actively in this docket, having Comments filed in response to the Commission's Notice of Proposed Rulemaking.[2] Accordingly, Commenters are parties to this proceeding with standing to file this Petition pursuant to Section 1.106(b)(1) of the Commission's rules.

I. The Burdens of Rate Regulation on Small Systems Must be Reduced.

Section 623(i) of the 1992 Cable Act provides that:

> In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.[3]

However, the Commission has taken only a few extremely modest steps in this direction:

- It permitted franchising authorities to exempt small systems from having to file an initial rate schedule.
- It indicated that it "will consider" whether financial, statistical, and leased access reporting obligations can be abbreviated for small systems, but has taken no action along these lines.
- It claimed that its rate benchmarks reflect "the unique characteristics of small systems, including the often higher costs of operating such a system."[4]

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[1]Report and Order, MM Docket No. 92-266, FCC 93-177 (released May 3, 1993) ("Report and Order").

[2]Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 92-544 (released December 24, 1992) ("Notice").

[3]47 U.S.C. § 543(i) (1992).

[4]Report and Order, ¶¶ 462-463.

In fact, the Commission's rate regulations create a tremendous increase, not a decrease, in the financial and administrative burdens placed on small systems. The exemption from filing an initial basic rate schedule (only if permitted by the franchising authority) is especially meaningless. The cable operator must still certify that its basic service and equipment rates "are reasonable under the FCC's rate standards."[5] The only way for the cable operator to determine this is to wade through Form 393 and the accompanying worksheets to determine its Maximum Initial Permitted Rate, unbundled equipment charges, etc. The only difference is that, after making such extensive calculations, the small cable operator might be allowed to submit a certification to the franchising authority that its rates are reasonable, instead of submitting the rates for approval. The small cable operator in this case has the same burden as the large operator. Only the franchising authority has a reduced burden by not having to extensively review the cable operator's initial rates. Moreover, the cost-of-service alternative is not a viable option for most small systems. As the Commission recognized in the Report and Order, cost-of-service showings are "unwieldy and expensive," even for larger systems.[6] For smaller systems, whose operating costs the Commission admits are "often higher,"[7] the problem would be exacerbated.

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[5] Id. at ¶ 462.

[6] Id. at ¶ 219.

[7] Id. at ¶ 463.

John Mansell, a cable analyst with Paul Kagan Associates, describes the situation bluntly: "If I was out there as the owner of a small cable system, I'd seriously be thinking of selling my business."[8] Certainly, neither Congress nor the Commission intended such a result. As Chairman Quello proclaimed in a June 8, 1993 speech to the National Cable Television Association Annual Convention, "the FCC is not in the business of putting investors out of business."[9] However, as the Chairman conceded, "I doubt that any of us are completely satisfied that we have done all that we can do to relieve small cable systems of unnecessary regulatory burdens. <u>We welcome your analysis of what more we could do in this regard.</u>"[10]

Commenters have several suggestions regarding what more could be done to equitably relieve small cable systems of unnecessary regulatory burdens:

1. As Chairman Quello has suggested, <u>the Commission should exempt small systems from basic rate regulation altogether.</u>[11] The Commission is clearly empowered to do so, and in fact has exempted small systems from various other regulations, including:

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[8] James Cox, <u>USA Today</u>, May 19, 1993, at 1.

[9] FCC Chairman James H. Quello, Address at the 42nd Annual Convention and Exposition of the National Cable Television Association (June 8, 1993).

[10] <u>Id</u>.

[11] <u>See</u> Kim McAvoy, "Quello Favors Small-Operator Exemption," <u>Broadcasting & Cable</u>, June 14, 1993, at 67.

- Syndicated exclusivity;[12]
- Network programming non-duplication;[13]
- Sports blackouts;[14]
- Proof-of-performance testing to meet the Commission's cable technical standards (as long as the system uses only frequencies allocated to over-the-air television or FM broadcasting);[15]
- Public inspection files requirements.[16]

The 1992 Cable Act's directive to the Commission to reduce administrative burdens on small systems is consistent with an exemption for such systems. The safety valve of a complaint process could be put in place to ensure some control over truly unreasonable actions by a small system operator.

2. <u>The definition of small system should be expanded to encompass systems serving franchise areas with fewer than 10,000 people</u>. Such an expansion would cover the many small systems with over 1000 subscribers which are in danger of being driven out of business by the Commission's rate regulations. A 10,000-person franchise [illegible]

There is precedent for this definition of small cable systems. Local exchange telephone carriers ("telcos") are exempt from the 1984 Cable Act's telephone/cable cross-ownership ban in "rural" areas, which the Commission has defined as non-urban census designated places containing less than 2500 inhabitants.[17] The Commission is currently seeking to expand its "rural" definition to include areas with up to 10,000 inhabitants, in order to ensure bring cable service to areas that are still unserved or underserved by cable.[18] Since smaller systems generally serve smaller, rural areas, an exemption from rate regulation for cable systems serving areas with up to 10,000 people would be wholly consistent with the Commission's telephone/cable cross-ownership policies. In fact, without such an exemption, the prospect of continued full cable service to many smaller communities could be jeopardized.

3. <u>Another alternative measures of system size is the 30 homes per route mile density standard</u> used in connection with the rural telco exemption to the telco/cable cross-ownership rules.[19] Based on such a measurement, any cable system serving fewer than 30 homes per route mile would qualify for small system relief from administrative burdens under the rate regulation rules. Both this and the population alternative are already used

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[17]47 C.F.R. § 63.58.

[18]<u>Second Further Notice of Proposed Rulemaking</u> in CC Docket No. 87-266, 7 FCC Rcd 5781, at ¶¶ 146-150 (1992).

[19]47 C.F.R. §§ 63.54 - 63.58.

by the Commission to identify small systems, and would thus be consistent with the Commission's policies in seeking to relieve small systems from the financial and administrative burdens of its new rate regulations.

4. The Commission must reaffirm that, under any modification to the treatment of small systems, including a small system exemption from rate regulation, small systems controlled by MSOs will continue to be treated the same as small independent systems, as is the case in the Commission's current rules. As the Commission explained in the Report and Order, the 1992 Cable Act does not distinguish between such systems, and small systems face similar problems, such as high costs and small subscriber bases, no matter who owns them.[20] These concerns would still exist where the small system provisions are modified, even if a blanket exemption results.

5. System size should be determined on a franchise area basis, not a principal headend basis, as is the current rule. Rate regulation under Section 623 of the Act is already administered on a franchise basis as to larger cable systems, and it makes no sense to treat small systems differently in this regard. Cable systems large and small must deal with individual franchising authorities regarding rate regulation. Each such city or town may have vastly different requirements and procedures. Moreover, there are many systems with well over 1000 subscribers which are spread across multiple small franchised

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[20] Report and Order, ¶ 464.

communities, each having under 1,000 subscribers. Under the current rules, such systems are not able to take advantage of the small system protections, even though they face the same difficulties as systems with single headends having over 1000 subscribers.

The Commission's current measurement of system size on a headend basis also discourages technological innovation. For instance, should a cable system with three headends, each headend serving several franchised communities with an aggregate of under 1000 subscribers per headend, desire to consolidate those separate headends into one and interconnect the franchise areas via fiber optic lines, measurement of system size on a headend basis would act as a disincentive to such a plant upgrade. Although still serving numerous separate franchise areas with under 1000 subscribers each, the system as a whole would be providing service to more than 1000 subscribers and would thus lose small system protection. The resultant increase in regulatory costs and burdens associated with such a shift in status may make the fiber upgrade prohibitively expensive. Such would not be the case if the small system test were applied on a franchise basis, allowing operators to speed technological advances in program delivery to their subscribers.

6. Require multiple franchising authorities regulating a single cable system to jointly file for rate regulation certification. The Commission did not establish such a requirement in its rate regulations, but merely encouraged such

joint filings.[21] However, the Commission provided no incentives for franchising authorities to make such joint certifications, or penalties for not doing so. Thus, there is no reason to believe that separate communities, which may have few or no ties aside from being served by the same cable system, will cooperate regarding rate regulation certification. Unless the Commission makes such joint filings mandatory, small cable systems will have to deal extensively with each separate city or town regarding rate regulation, with no relief from the attendant financial and administrative burdens.

In sum, as Chairman Quello has conceded, the Commission's rate regulation rules do not adequately address the needs of small cable system operators, as the 1992 Cable Act directed. Modifications to the rules are needed in order to prevent small cable operators from going out of business on a large scale. The Commenters have herein suggested several modifications which are and equipment rates.[22] Commenters submit that this rule exceeds the Commission's authority under the 1992 Cable Act.

Congress carefully circumscribed the power to regulate cable rates. Thus, Section 623 of the 1992 Cable Act states:

> No federal agency or state may regulated the rates for the provision of cable service except to the extent provided [herein] . . . . Any franchising authority may regulate [rates] . . . but only to the extent provided under this section.[23]

Section 623(c)(1)(C) of the Act contains a provision specifically authorizing refunds of unreasonable rates charged for cable programming services.[24] However, the Act contains no provision providing for refunds of basic cable service rates. It must be presumed that Congress knew what it was doing when it provided to the basic service tier, however, all rates must be approved in advance. This prospective approach is consistent with the lack of a refund provision.

The Commission simply dismissed the differing statutory treatment of refunds by stating that the omission of refund language in the basic cable rate context should not be construed as a prohibition. Commenters submit that the Commission did not adequately consider the context or the policy behind the two different schemes of regulation. Nor did the Commission adequately examine the intent of Congress in providing for refund authority for cable program services and not doing so for basic cable service rates.

Commenters note that the Commission's willingness to utilize its "broad rulemaking powers" to extend refund authority to local franchising authorities despite the statute's silence on the subject is not consistent with the Commission's approach elsewhere. Thus, in its Report and Order, MM Docket No. 92-259, 8 FCC Rcd 2965 (1993), the Commission followed the directive of the statute and provided that no network non-duplication requirements can be enforced as between qualified local non-commercial educational stations.[25] But since the statute did not contain a comparable provision for commercial stations, the Commission declined to modify its rules to prevent one must-carry station from requesting program exclusivity against another such

[25] Id. at n.33.

station.[26] The Commission reasoned ". . . that unlike the comparable situations for NCE stations, the statute does not prevent one commercial must-carry signal from requesting network nonduplication protection against another such signal."[27] The Commission cannot have it both ways. The Commission either must follow the statute or utilize its "broad rulemaking powers." It cannot follow one approach in one proceeding and a diametrically opposite approach in another proceeding without doing grievous harm to its own processes and to the parties being regulated.

III. The Commission's Equipment Cost Rate Methodology Does Not Permit the Recovery Of Costs

Section 623(b)(3) of the Cable Act of 1992 directs the Commission to establish standards based on actual costs plus a reasonable profit for ascertaining the rates for equipment leased by cable systems to its subscribers for use in receiving the basic service tier.[28] The methodology adopted by the Commission in the Report and Order results in a shortfall in cost recovery in some circumstances and virtually no cost recovery in others. Thus, Commenters submit that the Commission's methodology fails the requirements of Section 623(b)(3) of the Cable Act.

1. Installation Charges. The Commission's new rules permit installation charges to be recovered as a one-time charge when an installation is done. This charge is based on the non-

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[26] Id. at ¶ 54.

[27] Ibid.

[28] 47 U.S.C. § 543(b)(3).

capital equipment cost of performing an installation. It is basically an hourly charge for time and non-capital equipment. However, the Commission's methodology makes it highly unlikely that a cable system will ever recover the cost of previous installations. Most cable systems have historically performed installations at no charge or at a nominal, below cost fee. The cost of the installation is expected to be recovered over time as part of the recurring monthly charge for cable service. The Commission's benchmark methodology, however, requires that installation costs be included in the equipment costs for the prior year which must be subtracted in arriving at the maximum initial permitted rate per channel. These costs are then placed in the equipment basket. If a cable system has performed a large number of installations in the prior year, a significant portion of the equipment cost basket will consist of unrecovered installation costs. While it is true that these costs will enter into the calculation of the system's hourly service charge, the eventual recovery of all of these costs is unlikely.

Commenters suggest that the Commission can rectify this problem by permitting cable operators to exclude the cost of installations during the prior year from the equipment subtraction on Worksheet 3 in calculating the maximum permitted initial rate. This would only need to be done during the initial benchmark calculation since future installation costs will be recovered on a one-time cost-plus basis.

2. <u>Converters and Other Leased Equipment</u>. Under the Commission's methodology, the amount of the monthly equipment charge for converters, remotes and other leased equipment depends in large part on the extent to which this equipment has been depreciated. The larger the amount of accumulated depreciation, the lower the monthly charge that will be allowed for the equipment. This leads to situations in which original cost cannot be recovered over the remaining useful life of the equipment. Thus, for example, if an older converter originally cost $100.00 and its remaining useful life is approximately five years, the substantially depreciated capital investment will result in a monthly lease charge of approximately $1.00. At this rate, it will take the cable operator over eight years just to break even, much less earn a reasonable profit. Furthermore, this creates a financial disincentive for the cable operator to purchase and distribute new converters, either to new subscribers or for additional connections. This is because the cost of the new converter will be averaged with the existing stock of converters and the charge that the cable operator will be able to impose for this new converter will place him at an even greater economic disadvantage.

In addition, the Commission's methodology will have the result of imposing different converter charges on adjoining communities in circumstances where the converter may be identical. Thus, a cable system may be able to charge only $1.00 per month for a particular converter in one system because the equipment has been largely depreciated while charging as much as $2.50 monthly per converter in another system where the converters are new.

To correct this problem, the Commission should allow a calculation of the monthly leased equipment charge based on a pro forma methodology which allows the recovery of original cost of equipment over its useful life.

3. Additional Outlets. The Commission has chosen to preclude monthly charges for the provision of service to additional outlets in a subscriber's premises. The exception to this are charges for any leased equipment and the possible imposition of additional programming costs and signal booster costs if either of these are applicable.[29] This policy will result in a significant revenue loss to most cable operators which will have results which Commenters believe were not intended.

Under the Commission's rules, a cable operator is responsible for signal leakage and the maintenance of technical standards throughout its system.[30] These rules must be observed up to the input terminal of each television set receiving service on a subscriber's premises. In order to meet these standards, the cable operator must have the capacity to deliver adequate responsible for signal leakage throughout each subscriber's premises. The capital costs to accomplish this both within and without a subscriber's home and the expected maintenance and repair costs to maintain the requisite standards were built into monthly subscriber charges for both the primary outlet and additional outlets. This allocation was based on the share of these costs which additional outlets were deemed to bear. The Commission has now totally altered this pricing policy by forbidding direct charges for additional outlets. These costs are not recouped in the monthly service charge for the primary outlet since under the benchmarks this is not a cost-based charge. Nor do the limited opportunities for charges connected with additional outlets provide an opportunity for the cable operator to recoup these costs.

If converters are needed for an additional outlet, the cable operator can, of course, lease these converters to the subscriber. However, as noted above, the cable operator may not even be able to recover the cost of these converters. Even if converter costs can be recovered, this does not begin to recover the cost of providing service to the additional outlet. The operator can charge an installation charge when the additional outlet is originally installed but this does not address the network and maintenance cost described above.

The Commission should allow operators to recover the additional costs that are incurred when service is provided to additional outlets. A methodology which apportioned a percentage of the capital expenditures for the network and the capital cost involved with providing the additional outlet to the subscriber along with the costs of repair and maintenance of additional outlets would result in a modest monthly charge which would allow the cable operator to recover its cost for the provision of this service. As in the case of other customer premises equipment, such a cost recovery method would be completely consistent with the 1992 Cable Act.

IV. Conclusion.

Commenters urge the Commission to reconsider its rate regulation decision in the manner, and for the reasons, explained in this petition.

Respectfully submitted,

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MID-AMERICA CABLE TELEVISION ASSOCIATION
MT. VERNON CABLEVISION
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